

TAB 3

Part 2 of 2

1 A DISTRICT JUDGE BY DESIGNATION IN THAT CASE. BUT IT'S VERY
2 SIMPLE, THAT IN MAHURKAR HE WAS FOLLOWING THE OLD RULE. IF YOU
3 LOOK AT THE PORTION OF THE DECISION THAT DISCUSSES THE ENTRY OF
4 AN INJUNCTION, HE STARTS FROM THE PREMISE IN THE RICHARDSON
5 CASE DECIDED BY THE FEDERAL CIRCUIT IN, I BELIEVE, 1988, THAT
6 INJUNCTION SHOULD ISSUE IN A PATENT CASE ONCE INFRINGEMENT HAS
7 BEEN FOUND. THAT'S EXACTLY WHAT THE SUPREME COURT UPSET IN THE
8 EBAY CASE. AND THAT SHOWS WHY MAHURKAR ISN'T TERRIBLY USEFUL
9 HERE. THAT'S OLD LAW.

10 SECOND POINT THEY MADE IS WE NEED TO LET THE
11 MARKET VALUE THE PATENT. WELL, THE JURY HAS VALUED THIS
12 PATENT. AND WE DIDN'T HEAR ANY RESPONSE FROM FINISAR WITH
13 RESPECT TO OUR CITATION OF THE SHATTERPROOF GLASS CASE. IN THE
14 SHATTERPROOF GLASS CASE, THE FEDERAL CIRCUIT'S ENDORSEMENT IS
15 EXACTLY WHAT WE'RE SUGGESTING THE COURT DO HERE. IT EVEN USES
16 THE TERM "COMPULSORY LICENSE." THAT'S NOT A BAD THING. IT'S
17 NOT TO BE FORBIDDEN. THAT'S EXACTLY WHAT WE HAVE TO DO HERE.
18 AND IN THE SHATTERPROOF GLASS CASE, THE DISTRICT COURT IMPOSED
19 THE SAME ROYALTY RATE FOR THE POST VERDICT COMPULSORY LICENSE
20 AS THE JURY HAD FOUND FOR THE PREVERDICT REASONABLE ROYALTY.

21 THE COURT: BUT HOW DO I FIGURE THAT OUT GIVEN
22 THAT WE HAVE -- HAVE BEEN VERY CLEAN EXCEPT FOR THE \$20,250.25?

23 MR. CASTANIAS: WELL, THE POINT IS, YOUR HONOR,
24 THAT THE -- THE JURY'S VERDICT IS THE JURY'S VERDICT. THAT'S
25 THE VALUATION OF THE PATENT. AND I THINK EVERYBODY HERE

1 AGREES, ALL THE WITNESSES, ALL OF THE LAWYERS, WE DON'T KNOW
2 EXACTLY WHAT WENT ON IN THAT ROOM; BUT WE DO KNOW THAT A
3 VALUATION WENT ON IN THAT ROOM. AND THAT'S THE VALUATION. AND
4 IT'S NOT EXACTLY \$1.32. IT'S \$1.32.09 OR SOMETHING LIKE THAT.
5 IT CARRIES ON SEVERAL DIGITS. SO THE MATH IS NOT -- IS NOT
6 PERFECT TO THE CENTS, BUT THAT'S FINE. WE CAN -- WE CAN
7 APPROXIMATE AND HONOR THE JURY'S VERDICT HERE WITH THE GOING
8 FORWARD COMPULSORY ROYALTY RATE.

9 THE COURT: AND HOW DO I DEAL WITH THE PROBLEM
10 THAT WAS BROUGHT UP AND THE ONE I WORRIED ABOUT BEFORE IN THAT
11 YOU'VE GOT SOME CUSTOMERS HAVING THREE OR FOUR BOXES, SOME OF
12 THE NEW BOXES MAYBE WILL HANDLE A COUPLE DIFFERENT TV SETS.
13 EVIDENTLY YOU'RE NOW TRACKING YOUR BOXES BETTER. WHY SHOULDN'T
14 I BE LOOKING AT SOMETHING LIKE GEM STAR AND LOOKING AT A PER
15 SUBSCRIBER? THAT WOULD SEEM TO BE A LITTLE BIT EASIER WAY OF
16 KEEPING A CONTROL. WE DON'T HAVE TO WORRY ABOUT CHANGES IN
17 TECHNOLOGY. IT'S A SUBSCRIBER -- BASE IT ON THAT SOMEHOW.

18 MR. CASTANIAS: THE COURT -- THE COURT COULD DO
19 THAT. WE WOULDN'T URGE THAT THE COURT DO THAT BECAUSE AS I
20 REMEMBER THE PROOFS THAT CAME IN THIS CASE, THE INFRINGEMENT
21 THAT WAS ALLEGED HAD TO BE DONE IN PART AT LEAST AT THE SET TOP
22 BOX LEVEL. AND SO A METRIC THAT'S BASED ON NUMBER OF SET TOP
23 BOX PLACES IN THE SERVICE -- PLACED INTO SERVICE IS IT'S CLEAN.
24 AS MR. MCGEORGE TESTIFIED, IT'S VERY EASY FOR US TO CALCULATE.
25 IT'S VERY EASY FOR US TO MAKE REGULAR REPORTS TO THE COURT WITH

1 REGARD TO THE NEW SET TOP BOXES PLACED INTO SERVICE.

2 THE COURT: BUT ON THE OTHER HAND, THE AMOUNT OF
3 MONEY DOESN'T COME FROM BOXES; IT COMES FROM PEOPLE. I MEAN,
4 THAT'S WHO YOU'RE CHARGING FOR THIS. SO, FOR THAT MATTER, I
5 GUESS IT COULD BE BY HOUSEHOLD, TOO. I'M NOT SURE WHETHER
6 SUBSCRIBERS -- I GUESS IT WOULD NOT BE TYPICAL TO HAVE MORE
7 THAN ONE SUBSCRIBER BY HOUSEHOLD.

8 MR. CASTANIAS: I DON'T -- I DON'T THINK THAT
9 WOULD BE TYPICAL. I DON'T THINK THERE'S BEEN ANY EVIDENCE ON
10 THAT, BUT I THINK THE MOST IMPORTANT POINT, YOUR HONOR, IS WHAT
11 MR. DONALDSON TOLD YOU TODAY AND WHAT HE TOLD YOU AT TRIAL.
12 AND THAT IS THE PER SET TOP BOX APPROACH IS THE INDUSTRY
13 STANDARD. THAT SEEMS TO ME TO BE THE TIE BREAKER.

14 THE COURT: GO AHEAD.

15 MR. CASTANIAS: BUT, WITH RESPECT TO FINISAR'S
16 CLAIMS THAT, OH, THIS IS GOING TO ENGENDER MULTIPLE LITIGATION.
17 NO. THE COMPULSORY LICENSE HERE WOULD BE PAID THROUGH THE LIFE
18 OF THE PATENT IF THE VERDICT REMAINS IN PLACE. YOU DON'T EVEN
19 NEED TO SEVER OFF ANOTHER CASE. THIS IS A SIMPLE MATHEMATICAL
20 CALCULATION.

21 TO THEIR POINT THAT A JURY TRIAL WOULD BE
22 REQUIRED ON THESE ISSUES, WE DISAGREE. THIS SORT OF POST
23 VERDICT ACCOUNTING IS AN EQUITABLE MATTER FOR THE COURT, AND
24 IT'S FOR THE COURT. IN MUCH THE SAME WAY THAT AN EMPLOYMENT
25 CASE IS FRONT PAID, IT'S TRADITIONALLY BEEN AN ISSUE FOR THE

1 COURT WHERE BACK PAY MIGHT BE DECIDED BY THE JURY.

2 FINALLY, THE POINT ABOUT WILLFUL INFRINGEMENT
3 AND MULTIPLYING THE DAMAGES ON POST VERDICT X BY DIRECTV, I
4 THINK THE COURT RECOGNIZED ONE OF THE FLAWS IN THAT ARGUMENT.
5 THERE'S ANOTHER FLAW IN IT, TOO, AND THAT THIS IS THAT IF
6 THERE'S A COMPULSORY LICENSE HERE, IT'S NOT INFRINGEMENT.
7 SECTION 271 A OF THE PATENT CODE SAYS: WHOEVER WITHOUT
8 AUTHORITY MAKES USE OR SELLS OFFERS FOR SALE, AND SO ON IS AN
9 INFRINGEMENT. THAT WOULD BE WITH AUTHORITY.

10 UNLESS THE COURT HAS FURTHER QUESTIONS ON THE
11 ISSUE OF THE INJUNCTION AND THE ISSUE OF THE GOING FORWARD
12 ROYALTY RATE, LET ME TURN TO THE MATTER OF ENHANCEMENT.

13 THE COURT: WELL, LET'S GET BACK TO -- YOU'RE
14 ARGUING FOR A SET TOP BOX FEE, ONE TIME FEE, AND YOU'RE
15 SUGGESTING \$1.32 BASED ON YOU'RE DIVIDING OUT, I GUESS, THE 55
16 MILLION WHAT THE JURY AWARDED OR SOMETHING LIKE THAT. BUT
17 OBVIOUSLY NEITHER I NOR ANY OTHER COURT OR ANY JURY WANTS TO
18 SEE THIS AGAIN, AND SO I ENTER A COMPULSORY LICENSE OF WHATEVER
19 X DOLLARS PER SET TOP BOX. HOW IS THAT GOING TO BE CALCULATED?
20 I MEAN, COUNSEL BROUGHT UP PRETTY GOOD POINT AND TECHNOLOGY
21 CHANGES. IS THE HOME ENTERTAINMENT UNIT INCORPORATING SET TOP
22 BOX TECHNOLOGY AS SET TOP BOX. IT COULD HANDLE SEVERAL TV'S.
23 THE OLD METHOD WAS ONE BOX PER TV, AND THAT WOULD HAVE
24 OBVIOUSLY RESULTED IN MORE REVENUE FOR THEM THAN A NEW BOX THAT
25 CAN HANDLE MULTIPLE TV'S. IF IT HADN'T DONE IT IN '95 ON YOUR

1 SET TOP BOX METHOD, IT WOULD HAVE BEEN, OKAY, WHATEVER. EVEN
2 IF TAKING YOUR EXPERT, 30 CENTS PER SET TOP BOX, EVERY SINGLE
3 SET TOP BOX WOULD GIVE THEM 30 CENTS. NOW, YOU GET INTO 2006,
4 2007 AND SET TOP BOXES ARE DIFFERENT. THEY'RE NOT JUST SELLING
5 ONE PER SUBSCRIBER, RATHER THAN THREE OR FOUR PER SUBSCRIBER.
6 HOW DO I -- HOW DO I INCORPORATE THAT?

7 MR. CASTANIAS: WELL, I THINK, YOUR HONOR, THAT
8 THE -- AS I MENTIONED BEFORE, THIS IS AN EQUITABLE
9 DETERMINATION FOR THE COURT. AND IF WE'RE GOING TO CONTINUE TO
10 BE PAYING IN ROYALTIES AND PROVIDING REPORTS TO THE COURT,
11 THERE'S GOING TO BE A MINIMAL AMOUNT OF CONTINUED INVOLVEMENT
12 ON THE COURT'S PART. I THINK THAT'S INHERENTLY PART OF A
13 COMPULSORY LICENSE PROGRAM. BUT IT'S GOING TO BE MINIMAL. AND
14 TO THE EXTENT THAT THAT ISSUE COMES UP IN THE FUTURE, THEN IT
15 CAN BE RESOLVED EITHER BY FIRST DISCUSSIONS WITH COUNSEL AS TO
16 HOW THAT METRIC IS BEING APPLIED WITHIN THE INDUSTRY. WE'RE
17 CERTAINLY GOING TO HAVE OTHER -- OTHER EVIDENCE FROM THE WAY
18 THAT THE OTHER LICENSES ARE DEALT WITH BECAUSE AGAIN THE SET
19 TOP BOX METRIC IS THE INDUSTRY STANDARD. IT'S THE IMPEG WAY OF
20 DOING BUSINESS. AS MR. DONALDSON TALKED ABOUT THE OTHER WAYS
21 THAT THE PER SET TOP BOX APPROACH IS USED IN THE INDUSTRY.
22 WE'RE CERTAINLY NOT GOING TO BE WRITING ON A CLEAN SLATE THERE.
23 WE'RE GOING TO HAVE SOME EXPERIENCE.

24 THE COURT: WAS THE IMPEG LICENSE ACCEPTED AS AN
25 EXHIBIT?

1 MR. CASTANIAS: I BELIEVE IT WAS, YOUR HONOR.

2 MR. SAVIKAS: WOULD YOU LIKE THE NUMBER?

3 THE COURT: WELL, THE NUMBER, AND DOES ANYBODY
4 KNOW WHAT -- DOES IT HAVE ANYTHING IN THERE ABOUT WHAT IS A SET
5 TOP BOX, BECAUSE THAT'S, IN EFFECT, WHAT THE QUESTION COMES UP,
6 THAT A SET TOP BOX UNDER THE OLD TECHNOLOGY IS SOMETHING THAT
7 RUNS ONE TV OR IS A SET TOP BOX ANY OLD THING THAT HAPPENS TO
8 RUN ONE TO A THOUSAND TVS? GO AHEAD. I MEAN, THAT'S JUST A
9 QUESTION THAT COMES UP IN ALL THIS.

10 MR. CASTANIAS: SURE. WE'LL TRY TO ANSWER THAT.

11 THE COURT: I THINK PLAINTIFFS HAVE MADE A POINT
12 THERE THAT NEEDS TO BE LOOKED AT.

13 MR. CASTANIAS: I'M INFORMED OF TWO THINGS, YOUR
14 HONOR, WHICH MAY BE HELPFUL. FIRST, IT'S DEFENDANT'S
15 EXHIBIT 223; IS THAT CORRECT? 222 AND 223. AND SECONDLY,
16 MR. TOUTON INFORMS ME THAT THOSE ARE ACTUALLY CALCULATED ON A
17 PER DECODER BASIS, WHICH WE VIEW AS EQUIVALENT TO PER SET TOP
18 BOX. AND TO THE EXTENT THAT THAT'S HELPFUL WITH REGARD TO NEW
19 TECHNOLOGY, THAT MAY BE USEFUL FOR THE COURT AND FOR THE
20 PARTIES AS WELL.

21 THE COURT: I'M SORRY. DID YOU SAY 223?

22 MR. CASTANIAS: I BELIEVE IT'S 223 AND 222 ARE
23 THE IMPEG LICENSES, DEFENDANT'S EXHIBITS.

24 MR. TOUTON: YOUR HONOR, LOUIS TOUTON HERE.

25 THE COURT: YES.

1 MR. TOUTON: FILL IN A LITTLE BIT ON THE SECOND
2 POINT THAT MR. CASTANIAS JUST GAVE, IS THAT THE IMPEG LICENSE
3 MEASURES THE ROYALTY IN TERMS OF DECODERS, THAT IS, THE
4 CIRCUITRY IN THE BOX THAT PRODUCES A UNIQUE OUTPUT THAT A
5 TELEVISION COULD RECEIVE. AND, THEREFORE, IN A BOX THAT
6 HYPOTHETICALLY IN THE FUTURE COULD SUPPORT TWO TELEVISIONS,
7 THERE WOULD BE TWO DECODERS AND TWO ROYALTIES DUE UNDER THE
8 IMPEG LICENSE.

9 THE COURT: I'M SORRY --

10 MR. TOUTON: THERE'S A DEFINITION --

11 THE COURT: PARAGRAPH 1.14 AND 1.15, WHERE THEY
12 START TALKING ABOUT WHERE DECODING PRODUCTS, DECODING SOFTWARE
13 IS IN THAT LICENSE AND THEN -- OKAY. ALL RIGHT. GO AHEAD.

14 MR. CASTANIAS: THANK YOU, YOUR HONOR. IF I CAN
15 TURN TO THE ISSUE OF ENHANCEMENT FOR A MOMENT. IT'S WORTH
16 TREATING BOTH THE ISSUE OF ENHANCEMENT AND ATTORNEY'S FEE
17 SOMEWHAT TOGETHER BECAUSE THE STANDARDS ARE SIMILAR, ALTHOUGH
18 THEY'RE NOT IDENTICAL. AND FINISAR'S CLAIMS OF ENTITLEMENT ARE
19 BASED IN ESSENCE ON THE SAME TWO FACTORS. BUT LET ME START
20 WITH ENHANCEMENT BECAUSE IT'S BASED AS MR. ROBERTS SAID
21 PRIMARILY ON THE JURY'S FINDING OF WILLFUL INFRINGEMENT.

22 NOW YOUR HONOR HAS CARRIED AND CONTINUES TO
23 CARRY OUR MOTION FOR JMOL OF NONWILLFULNESS, AND THAT MOTION
24 SHOULD BE GRANTED AT THE APPROPRIATE TIME. FINISAR'S
25 WILLFULNESS CASE IN THIS LITIGATION BASICALLY BOILS DOWN TO

1 DIRECTV KNEW OF THE PATENT AND YET CONTINUED TO INFRINGE. WE
2 POINTED OUT IN YESTERDAY'S BRIEF AND IN OUR JMOL MOTIONS,
3 THAT'S NOT THE LAW. IN FACT, THE FEDERAL CIRCUIT HAS SUSTAINED
4 TRIAL COURT GRANT OF JMOL, OF NONWILLFULNESS IN QUITE SIMILAR
5 CIRCUMSTANCES. IN FACT, WHAT DIRECTV AND MR. CROOK DID IN
6 RESPONSE TO FINISAR'S ACTIONS WAS NOT REASONABLE AS A MATTER OF
7 LAW, THEN WILLFULNESS REALLY DOESN'T MEAN MUCH OF ANYTHING. IN
8 FACT, WHAT WE SUBMIT IS THAT THE COURT SHOULD FOLLOW THE
9 APPROACH THAT THE FEDERAL CIRCUIT TOOK IN THE RECORPORATION
10 CASE, WHICH IS THE CASE THAT LAYS OUT THE ENHANCEMENT FACTORS.
11 BUT THAT CASE FOUND NO WILLFULNESS AS A MATTER OF LAW, AND IT
12 WAS IN ESSENCE FOR TWO REASONS: ONE, BECAUSE THERE WAS NO
13 COPYING; AND TWO, BECAUSE THERE WAS A COMPETENCE OPINION LETTER
14 REASONABLY RELIED UPON, THE SAME THAT WE HAVE HERE.

15 BUT THE QUESTION THAT FINISAR HAS PUT BEFORE THE
16 COURT TODAY IS THE MATTER OF ENHANCED DAMAGES. AND THEY'VE
17 OFFERED NOTHING BUT A SUGGESTION THAT YOU DO THE MAXIMUM AND
18 TREBLE THE DAMAGES IN THIS CASE. AND WHAT WE'RE REALLY TALKING
19 ABOUT HERE, YOUR HONOR, IS PUNITIVE DAMAGES. IN THE SUPREME
20 COURT'S PUNITIVE DAMAGES CASE STATE CONDUCT HAS TO BE PRETTY
21 REPREHENSIBLE TO ALLOW PUNITIVE DAMAGES CONSISTENT WITH THE DUE
22 PROCESS CLAUSE. UNDER RECORPORATION, THAT'S BASICALLY WHAT THE
23 COURT IS USING THOSE FACTORS TO HELP IT FIND. THE WORDS OF
24 THAT DECISION IS TO ASSIST THE TRIAL COURT IN EVALUATING THE
25 DEGREE OF THE INFRINGER'S CULPABILITY.

1 NOW, OUR BRIEFS HAVE SHOWN THAT THERE IS JUST
2 NOT THE LEVEL OF CULPABILITY OR REPREHENSIBILITY PRESENT HERE
3 TO JUSTIFY AWARDING PUNITIVE DAMAGES IN ANY AMOUNT TO FINISAR.
4 I'M NOT GOING TO REPEAT THOSE SHOWINGS, BUT I DO WANT TO
5 EMPHASIZE THE FOLLOWING: ONE, NO COPYING IN THIS CASE.
6 DIRECTV WAS ON THE MARKET BEFORE THE 505 PATENT EVEN ISSUED.
7 NUMBER TWO, MR. CROOK OBTAINED A COMPETENT, DETAILED 55-PAGE
8 LONG INFRINGEMENT OPINION FROM MR. ZIMMERMAN AND REASONABLY
9 RELIED UPON. THERE IS NO REQUIREMENT, AS FINISAR ARGUED TO THE
10 JURY AND REPEATS IN ITS BRIEF HERE. BUT AN OPINION ADDRESSED
11 BOTH NONINFRINGEMENT AND INVALIDITY. THAT'S THE GRACO AGAINST
12 BINKS IN 60 FED. 3RD. FINISAR'S CRITICISMS OF MR. ZIMMERMAN'S
13 OPINION IN THIS CASE HAVE BEEN AT BEST THE SORT OF AROUND THE
14 EDGES, NITPICKING CRITICISMS, AND THEY DO NOT UNDERMINE ITS
15 ESSENTIAL COMPETENCE.

16 ANOTHER POINT, THIS CASE WAS AND REMAINS BY ANY
17 MEASURE CLOSE. THAT WAS EXACTLY THE WORD THIS COURT USED IN
18 DESCRIBING OUR CONTINUED TO BE CARRIED MOTION FOR SUMMARY
19 JUDGMENT AND NOW JUDGMENT AS A MATTER OF LAW WITH RESPECT TO
20 ANTICIPATION BASED ON THE DEXA (PHONETIC) ARCHITECTURE
21 VIDEOTECH SYSTEMS TEXTBOOK. THE COURT SAID IT WAS VERY, VERY
22 CLOSE.

23 IN ADDITION, WE PREVAILED ON EIGHT OF THE 15
24 CLAIMS IN THIS SUIT. SEVEN OF THEM WERE FOUND BY THIS COURT TO
25 BE INVALID AND INDEFINITE, AND EIGHT CLAIMED 25 WAS DROPPED

1 VIRTUALLY ON THE EVE OF TRIAL AND STIPULATED TO BE
2 NONINFRINGING BY FINISAR. AND THAT DID -- CONTRARY TO WHAT
3 FINISAR SAYS IN ITS BRIEF OF YESTERDAY, QUOTE, ALTER THE
4 RELATIONSHIP OF THE PARTIES BECAUSE FINISAR NOW HAS SEVEN
5 CLAIMS THAT IT CAN'T USE AGAINST ANYBODY ANYWHERE ANYTIME
6 ANYMORE.

7 IN ADDITION, SHOWING MORE OF THE CLOSENESS OF
8 THIS CASE THIS COURT HAS CONTINUED TO CARRY SEVERAL OF THE
9 GROUNDS IN OUR JMOL MOTIONS, ALL THAT ARE NONINFRINGMENT
10 MOTIONS. AND EVEN THE ISSUE OF WILLFULNESS, WHICH WAS THE
11 SUBJECT OF ONE OF THOSE MOTIONS, IS AT THE VERY LEAST A CLOSE
12 ISSUE.

13 ANOTHER FACTOR UNDER THE RECORPORATION CASE,
14 THERE WAS NO EFFORT ON THE PART OF DIRECTV TO CONCEAL ITS
15 MISCONDUCT. AND MOREOVER, THERE WAS NO MOTIVATION TO HARM
16 FINISAR, NOTWITHSTANDING THE ALLEGATION MADE IN FINISAR'S JUNE
17 28TH BRIEF THAT WE INTENDED HARM TO A LICENSING PROGRAM OF
18 FINISAR. YOU CAN'T FIND A SINGLE PIECE OF EVIDENCE THAT LEADS
19 TO THAT CONCLUSION IN THIS CASE. THAT IS ATTORNEY ARGUMENT.

20 IN SHORT, YOUR HONOR, OUR CONDUCT WAS IN GOOD
21 FAITH AND NOWHERE NEAR THE SORT OF REPREHENSIBLE CONDUCT THAT
22 MERITS PUNITIVE OR ENHANCED DAMAGES.

23 NOW, TURNING TO A COUPLE OF THE POINTS THAT
24 FINISAR MADE WITH REGARD TO ENHANCEMENT THIS MORNING, WHAT I
25 HEARD A LOT ABOUT WAS DIRECTV'S ABILITY TO PAY. WHILE THAT

1 MIGHT BE APPROPRIATE TO CONSIDER UNDER THE RECORPORATION
2 FACTORS ONCE THE COURT HAS DETERMINED THAT THERE'S
3 REPREHENSIBLE PUNISHABLE CONDUCT, THAT'S NOT THE CASE HERE.
4 THERE ISN'T A FACTOR THAT SHOWS EGREGIOUS REPREHENSIBLE CONDUCT
5 HERE.

6 I HEARD THEM ALSO SAY THAT MR. CROOK PUT THE
7 ZIMMERMAN OPINION IN A DRAWER. HE DIDN'T HOLD A MEETING; HE
8 DIDN'T HAVE A TECHNICAL PERSON REVIEW IT. WELL, I'M SURE THAT
9 THAT OPINION EVENTUALLY WENT INTO A FILE CABINET. BUT IT WAS
10 READ, AND IT WAS RELIED UPON. AND DIRECTV DID NOT CHANGE
11 BECAUSE MR. CROOK HAD A COMPETENT OPINION LETTER THAT SAID
12 YOU'RE NOT INFRINGING.

13 MOREOVER, I URGE THE COURT TO TAKE A LOOK AT THE
14 ZIMMERMAN OPINION LETTER. LOOK AT THE NUMBER OF PAGES IN THAT
15 EXHIBIT DEVOTED TO DISCUSSING OF THE TECHNICAL ASPECTS OF HOW
16 THE GUIDE SYSTEM WORKS. IT'S HARD TO SAY THAT THAT WAS WRONG.
17 IN FACT, I DON'T THINK FINISAR'S EVER SAID THAT IT WAS WRONG
18 WITH RESPECT TO ITS DESCRIPTION OF THE GUIDE SYSTEM. WHAT IT
19 SAID IS IT DIDN'T ADDRESS THE REST OF THE SYSTEM.

20 BUT LET ME NOW TURN TO THE ISSUE OF ATTORNEY'S
21 FEES BECAUSE THE ONE FACTOR IN RECORPORATION I'VE LEFT OUT IS
22 THE ONE THAT THEY ADDRESS UNDER THE HEADING OF ATTORNEY'S FEES.
23 AS I MENTIONED BEFORE, THE STANDARDS HERE ARE SIMILAR, BUT NOT
24 QUITE IDENTICAL. THEIR MAIN CASE FOR ATTORNEY'S FEES IS THEY
25 SAY WHILE THE JURY FOUND WILLFULNESS, THAT'S ENOUGH, YOU SHOULD

1 AWARD US OUR FEES. BUT SECTION 285 ISN'T A SIMPLE FEE SHIFTING
2 STATUTE, EVEN IN THE CASE OF WILLFULNESS. THE COURT STILL HAS
3 TO FIND THE CASE EXCEPTIONAL, AND THE COURT'S BURDEN IN THAT
4 CASE IS TO FIND IT BY CLEAR AND CONVINCING EVIDENCE. EVEN WERE
5 THE COURT TO FIND IT EXCEPTIONAL, IT WOULD THEN HAVE TO MAKE
6 THE FURTHER DETERMINATION THAT ATTORNEY'S FEES WERE MERITED.
7 THAT'S THE MODINE MANUFACTURING CASE IN 970 S.2D., CITED IN OUR
8 BRIEF.

9 FOR THE SAME SORTS OF REASONS THAT I'VE OUTLINED
10 WITH REGARDS TO ENHANCEMENT, THE ATTORNEY'S FEES HERE SHOULD
11 ALSO BE DENIED. THIS CASE WAS CLOSED ON NUMEROUS GROUNDS.
12 EVEN IF FINISAR'S WILLFULNESS CLAIM IS NOT OVERTURNED ON JMOL,
13 THAT ISSUE ITSELF WAS TOO CLOSE TO MERIT FEES. WE PREVAILED ON
14 EIGHT OUT OF THE 15 CLAIMS IN THE SUIT, AND THE CASE WAS
15 LITIGATED FAIRLY AND WELL ON BOTH SIDES. IN ALL THOSE REGARDS
16 THIS CASE WAS NOT EXCEPTIONAL WITHIN THE MEANING OF SECTION
17 285.

18 NOW THAT SAID, IT IS APPROPRIATE FOR US TO
19 BRIEFLY COMMENT ON THE ACCUSATIONS THAT ARE LACED THROUGHOUT
20 FINISAR'S MAIN BRIEF, THE ACCUSATION OF LITIGATION MISCONDUCT.

21 THE COURT: WELL, I'M SURE YOU DISAGREE WITH ALL
22 OF THEM.

23 MR. CASTANIAS: WELL -- AND INDEED I'M NOT GOING
24 TO GO THROUGH THEM.

25 THE COURT: THAT'S PUT IN YOUR BRIEFS. I MEAN,

1 YOU MIGHT WANT TO PROPERLY GET INTO THE ISSUE OF THE -- YOU'D
2 MENTIONED COST AND YOU'D MENTIONED THE CALCULATION OF
3 PREJUDGMENT INTEREST.

4 MR. CASTANIAS: RIGHT. I'D JUST LIKE TO MAKE
5 ONE MORE POINT WITH REGARD TO THE FEES AND --

6 THE COURT: ALL RIGHT.

7 MR. CASTANIAS: WE DON'T CLAIM TO BE THE ONLY
8 PREVAILING PARTY HERE. I BELIEVE I HEARD THERE'S 79 MILLION
9 REASONS WHY WE'RE NOT THE PREVAILING PARTY. OUR CLAIM IS THAT
10 WE WERE ALSO THE PREVAILING PARTY BECAUSE WE INVALIDATED SEVEN
11 CLAIMS AND WON ON AN EIGHTH. THE MANILDRA DRILLING CASE WHICH
12 IS FINISAR'S CASE THAT IT CITED IN ITS BRIEF FILED YESTERDAY
13 SAYS WITH HANDLING A COMPETITOR'S PATENT BE DECLARED INVALID
14 MEETS THE DEFINITION OF PREVAILING PARTY. THE SAME GOES FOR
15 THE CASE OF FINLAND STEEL CITED IN OUR BRIEF.

16 LET ME TURN VERY QUICKLY TO THE ISSUE OF
17 PREJUDGMENT INTEREST. AS THE COURT HAS NOTED, WE DON'T OPPOSE
18 FINISAR'S REQUEST FOR INTEREST AT THE TEXAS STATUTORY RATE; BUT
19 WHAT WE DO SAY IS THAT THE TEXAS STATUTORY RATE AS A MATTER OF
20 STATUTORY CONSTRUCTION IS SIMPLE INTEREST. THAT'S THE
21 EQUITY -- IF YOU'LL EXCUSE ME FOR JUST A SECOND, YOUR HONOR,
22 LET ME GRAB THE CASE. THAT'S THE T8 VERSUS MUTUAL LIFE
23 INSURANCE OF NEW YORK CASE OUT OF THIS DISTRICT IN 1997, IN
24 FACT IT'S EVEN OUT OF THIS DIVISION. IT SAYS THAT UNDER THE
25 TEXAS STATUTE IT ALLOWS FOR INTEREST AT THE RATE OF SIX PERCENT

1 PER ANNUM, WHICH THE TEXAS COURTS HAVE INTERPRETED AS MEETING
2 SIMPLE INTEREST. THAT'S AT 893 TO 894 OF 965 F. SUPP. THE
3 COURT GOES ON TO SAY IN A LATER PORTION OF THE OPINION, AGAIN
4 DISCUSSING THE TEXAS STATUTE: THIS SIX PERCENT PER ANNUM IS
5 SIMPLE INTEREST, AND IT CITES THE GORMAN AGAINST LIFE INSURANCE
6 COMPANY OF NORTH AMERICA CASE AT 859 SOUTHWESTERN 2D. 382, OUT
7 OF THE TEXAS COURT OF APPEALS, HOUSTON, FIRST DISTRICT, 1993
8 AND CHEMICAL COMPANY VERSUS DEHAVEN, 824 SOUTHWESTERN 2D. 257,
9 ALSO OUT OF THE HOUSTON TEXAS APPEALS COURT 14TH DISTRICT, AND
10 THEN A SOUTHERN DISTRICT OF TEXAS CASE OF HARTFORD ACCIDENT AND
11 INDEMNITY, 862 F. SUPP. 160. OUR POINT WITH REGARD TO
12 COMPOUNDING IS THIS: THE TEXAS STATUTE SAYS IT'S SIMPLE.
13 THAT'S THE WAY THE INTEREST SHOULD BE CALCULATED. ALSO ADD
14 THAT WITH REGARD TO THE PARTICULAR METRICS WITH REGARD TO THE
15 COMPOUNDING CALCULATIONS THAT FINISAR OFFERS, ALL THEY OFFERED
16 TODAY WAS SUPPOSITIONS AND HOW DIRECTV PROBABLY GETS ITS MONEY
17 TO SUPPORT THOSE CALCULATIONS. AND WE DON'T HAVE ANY EVIDENCE
18 ON THAT, AND I THINK THE COURT POINTED OUT THAT THERE -- IT WAS
19 A LITTLE BIT OF UNREALITY TO DOING IT ON A DAILY BASIS.

20 FINALLY, LET ME ADDRESS THE ISSUE OF COST VERY
21 BRIEFLY. FINISAR SAYS IT'S NOT TIME TO ASK FOR COSTS. WE
22 BELIEVE THIS IS EXACTLY THE SORT OF THING THAT SHOULD BE
23 DETERMINED NOW, CAN BE DETERMINED NOW, AND IT SHOULD BE DENIED
24 NOW.

25 AGAIN, I POINT OUT DEFENDANTS PREVAIL ON EIGHT

1 CLAIMS; FINISAR, ON SEVEN. WE'RE NOT CLAIMING TO BE THE
2 PREVAILING PARTY, BUT WE ARE CLAIMING THAT WE WOULD BE ENTITLED
3 TO OFFSET IN THAT CIRCUMSTANCES, SO THE ISSUE OF COST WASHES
4 OUT.

5 IN ADDITION, BECAUSE SEVEN OF THE 505 PATENT
6 CLAIMS WERE DECLARED INVALID AND HAVE NOT TO THIS POINT BEEN
7 DISCLAIMED AT THE PATENT AND TRADEMARK OFFICE, SECTION 288 OF
8 TITLE 35, THE PATENT LAWS, THIS ENTITLES FINISAR TO COSTS IN
9 THIS CASE. FINISAR'S REQUEST FOR COST SHOULD BE DENIED.

10 THE COURT: LET ME ASK YOU. IN THE -- ATTACHED
11 TO ONE OF YOUR BRIEFS, I'VE GOT DEFENDANT'S RECALCULATION,
12 PLAINTIFF'S CALCULATION OF PREJUDGMENT INTEREST, AND THEN GOT
13 DEFENDANT'S RECALCULATIONS. NOW YOU HAVE IN THERE COMPOUNDED
14 ANNUALLY. AND YOU COME UP WITH \$13 MILLION AS OPPOSED TO THEIR
15 \$14 MILLION. THAT'S WHAT I'M UNDERSTANDING THE DIFFERENCE HERE
16 TO BE?

17 MR. CASTANIAS: IF THE COURT REJECTS THE TEXAS
18 LAW THAT SAYS THAT THE INTEREST IS SIMPLE INTEREST, THAT WOULD
19 BE THE DIFFERENCE. BUT IF YOU TURN BACK TO EXHIBIT 1 -- I
20 THINK YOU'RE LOOKING AT EXHIBIT 2, YOUR HONOR.

21 THE COURT: OKAY.

22 THE CLERK: YOUR TIME IS UP.

23 MR. CASTANIAS: YOUR HONOR, I'LL TRY TO ANSWER
24 THIS QUESTION, AND THEN I'LL BE DONE.

25 THE COURT: ALL RIGHT.

1 MR. CASTANIAS: DO YOU HAVE EXHIBIT 1 IN FRONT
2 OF YOU? IF NOT, I CAN GET IT.

3 THE COURT: I HAVE IT.

4 MR. CASTANIAS: EXHIBIT 1 SHOWS AT SIMPLE
5 INTEREST, THE NUMBER WOULD BE 11,163,697.

6 THE COURT: OKAY. ALL RIGHT.

7 MR. CASTANIAS: THANK YOU, YOUR HONOR.

8 MR. ROBERTS: WE JUST HAVE TWO MINUTES FOR
9 REBUTTAL, YOUR HONOR?

10 THE COURT: ALL RIGHT.

11 MR. ROBERTS: I JUST WANTED TO POINT OUT THAT ON
12 DETERMINING COSTS UNDER THE STATUTE, IT'S NOT POSSIBLE TO JUST
13 DISCLAIM A PATENT CLAIM THAT'S INVALID UNLESS YOU KNOW IT'S
14 INVALID AT THE TIME. SO ASKING US TO DISCLAIM THAT PRIOR TO
15 THE FILING OF SUIT IS REALLY AN EXERCISE IN CLAIRVOYANCE IN
16 THAT YOU MUST NOT HAVE THE STATUTE SHOULD BE CONSTRUED. I
17 DON'T KNOW IF THIS IS IN THE PAPERS, BUT IF YOU TAKE THE JURY'S
18 DAMAGES FINDINGS, DIVIDE THAT INTO THE REVENUE, I BELIEVE THE
19 RATE IS .1428 PERCENT. THAT WOULD OBVIOUSLY BE PREFERABLE TO
20 \$1.32 PER SET TOP BOX BASIS BECAUSE OF THE DIFFICULTIES WE'VE
21 OUTLINED IN IDENTIFYING WHAT A SET TOP BOX IS.

22 FINALLY, THE SHATTERPROOF GLASS CASE IS REALLY
23 AN ANOMALY. IN THAT CASE THE PLAINTIFF ASKED FOR FOUR PERCENT.
24 THE JURY GAVE HIM FIVE PERCENT, AND THE PLAINTIFF SAID THAT'S
25 GREAT, WE'LL TAKE IT. AND IT WAS THE DEFENDANT WHO OPPOSED

1 THAT ENTRY, THAT COMPULSORY LICENSE POST VERDICT, NOT THE
2 PLAINTIFF. SO THE ISSUES THAT WERE PRESENT IN THIS CASE WERE
3 REALLY NOT LITIGATED IN THAT CASE.

4 FINALLY, THE MAHURKAR CASE IS USEFUL BECAUSE OF
5 THE ECONOMIC ANALYSIS PROVIDED BY JUDGE EASTERBROOK ON THE
6 VALUE OF AN INJUNCTION. AND HERE THE BALANCE OF THE HARM, THEY
7 TALKED ABOUT THE FCC LICENSE, BUT WE REALLY SEE NO EVIDENCE
8 ABOUT THAT, JUST SOME QUOTING OF THE STATUTE, AND WE DON'T KNOW
9 REALLY WHAT THE IMPACT OF THAT WOULD BE. THANK YOU, YOUR
10 HONOR.

11 THE COURT: ALL RIGHT.

12 MR. CASTANIAS: YOUR HONOR, ONE POINT. THE .14,
13 WHATEVER THE NUMBERS WERE THAT WERE OFFERED BY MR. ROBERTS IN
14 REBUTTAL, THIS IS THE FIRST TIME WE'VE HEARD THAT BECAUSE IT'S
15 NOT IN THE BRIEF. IT'S A LITTLE LATE FOR US TO BE ABLE TO
16 RESPOND TO THAT.

17 THE COURT: OKAY. WE'VE GOT -- ACTUALLY I'D
18 NORMALLY TAKE A BREAK, BUT I'VE GOT A DOCTOR'S APPOINTMENT THIS
19 AFTERNOON, SO I'M GOING TO GO AHEAD AND MAKE MY ANNOUNCEMENTS
20 NOW.

21 FIRST, BEFORE I FORGET BECAUSE OF THE BULK OF
22 PAPER EXHIBITS, I AM GOING TO ORDER THAT THE PARTIES GET
23 TOGETHER, TAKE THE ADMITTED EXHIBITS, GO AHEAD AND PUT THEM ON
24 DISK LIKE YOU DID WITH ALL THE OTHER LISTS, AND THAT'S WHAT THE
25 DEPUTY CLERK WILL KEEP OR OUR CLERK'S OFFICE WILL KEEP. IT'S

1 THE DISK FORM OF THEM. AND THEN THE PARTIES WILL BE
2 RESPONSIBLE FOR KEEPING THE ORIGINALS. AND SHOULD THE HIGHER
3 COURT ASK FOR A COPY OF ONE OR ANOTHER, THEN YOU'LL BE
4 RESPONSIBLE FOR GETTING IT UP. AND IF THERE WINDS UP BEING
5 SOME KIND OF A PROBLEM OVER, GEE, THAT ISN'T THE REAL EXHIBIT
6 THAT'S BEING SET FORWARD, THE COURT SHOULD HAVE THE ELECTRONIC
7 COPY. THAT'LL MEAN OBVIOUSLY SOME COOPERATION WHERE YOU VIEW
8 EACH OTHER'S VERSIONS. SOME OF THEM -- I THINK THERE ARE A
9 COUPLE OF THEM THAT'S REDACTIONS OR A PAGE TAKEN OUT OR
10 SOMETHING LIKE THAT; BUT I'D LIKE TO GET THAT DONE SO THAT OUR
11 LIMITED STORAGE SPACE DOWNSTAIRS IS NOT COMPLETELY TAKEN UP
12 WITH THESE BOXES, ESPECIALLY IN VIEW OF THE NUMBER OF PATENT
13 CASES I'M GETTING IN. IF I -- I SHOULD HAVE THOUGHT OF THAT
14 EARLIER, BUT THAT'S WHAT I WANT DONE ON THAT. WE'LL KEEP THE
15 ELECTRONIC VERSION. YOU'LL BE RESPONSIBLE FOR THE ORIGINALS OF
16 YOUR OWN. IF THERE'S ANY DISPUTE, THEN THE ELECTRONIC VERSION
17 WILL BE THE ONE, SO I SUGGEST THAT BOTH SIDES CHECK THAT
18 ELECTRONIC, MUTUALLY EXCHANGE THOSE, MAKE SURE THEY'RE CORRECT
19 AND THEN HANG ON TO THEM.

20 ALL RIGHT. AS FAR AS THE -- I'LL START OFF WITH
21 THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON THE GECSEI
22 TEXTBOOK, THAT'S DOCUMENT, I BELIEVE, 106 AND THE MOTIONS FOR
23 JMOL ON ANTICIPATION. TAKING A LOOK AT ANTICIPATION, THE COURT
24 REFERS TO BROWN VERSUS 3M AT 265 FED.3RD, 1349, FIFTH CIRCUIT
25 2001. AND THAT CASE TEACHES A NUMBER OF THINGS, BUT ONE OF

1 THOSE IS THAT ANTICIPATION SUFFICIENT TO PRECLUDE PATENT
2 PROTECTION MEANS A LACK OF NOVELTY. IT'S A QUESTION OF FACT.
3 AND FOR ANTICIPATION TO PRECLUDE PATENT PROTECTION, EVERY
4 ELEMENT AND LIMITATION OF THE CLAIMED INVENTION MUST BE FOUND
5 IN A SINGLE PRIOR REFERENCE. AND THEN THEY POINT OUT -- THIS
6 IS A SHORTHAND WAY -- THAT WHICH INFRINGES A PATENT, IT LATER
7 WINDS UP ANTICIPATING AN EARLIER. IN OTHER WORDS, YOU
8 BASICALLY HAVE TO LAY OUT THE INVENTION IN THE ANTICIPATED
9 REFERENCE. I THINK BOTH EXPERTS ON BOTH SIDES UNDERSTOOD THAT.

10 LOOKING AT A SUMMARY JUDGMENT, AT THE SUMMARY
11 JUDGMENT FIRST, ALL FACTS AND DISPUTES HAVE TO BE RESOLVED IN
12 FAVOR OF THE NONMOVEMENT. IN THAT CASE -- IN THIS CASE IT
13 WOULD BE -- WOULD HAVE TO BE RESOLVED IN FAVOR OF FINISAR. AND
14 TO SOME DEGREE IT WAS CLOSE, BUT THE STANDARD, OF COURSE, IS
15 CLEAR AND CONVINCING EVIDENCE TO OVERCOME THE PRESUMPTION OF
16 INVALIDITY.

17 NOW MR. EDEN'S REBUTTLE IN THE COURT'S MIND WAS
18 SOMEWHAT CONFUSING. IT KEPT FOCUSING ON THINGS THAT DR. TJADEN
19 REALLY DIDN'T SAY AND TALKING ABOUT THAT 10.5 DIAGRAM RATHER
20 THAN TAKING A LOOK AT THE TEXT ITSELF. BUT ON THE OTHER HAND,
21 DR. TJADEN'S AFFIDAVIT THE WAY HE CHARTED EXACTLY WAS NOT
22 CLEAR. I CAN TELL YOU, THE COURT HAD THE VERY DIFFERENT
23 IMPRESSION THAT TO COMBINE THE CHART DESCRIPTION FOR ONE STEP
24 OR THE CHART DESCRIPTION FOR ANOTHER STEP, AND TO COMBINE THAT
25 WITH PARTS OF THE TEXT THAT WEREN'T EVEN CHARTERED OR MENTIONED

1 IN THE AFFIDAVIT. THAT MIGHT GET PRETTY CLOSE TO ANTICIPATION.
2 BUT THAT'S NOT CLEAR, IT'S NOT CONVINCING, AND IT'S THE LIGHT
3 MOST FAVORABLE TO NONMOVEMENT. SO MOTION FOR SUMMARY JUDGMENT
4 IS DENIED.

5 THEN WHEN WE TAKE A LOOK AT THE JUDGMENT AS A
6 MATTER OF LAW, OF COURSE, THERE WE'RE TAKING A LOOK AT THE
7 STANDARD OF REVIEW ON A JMOL, AND AS IT'S PRETTY COMMON LAW,
8 THE COURT CAN'T MAKE CREDIBILITY DETERMINATIONS, CAN'T WEIGH
9 CONFLICTING EVIDENCE. THAT'S REEVES VERSUS SANDERSON PLUMBING
10 AT 530 US. 133 -- THAT'S AT PAGE 155 -- 120 SUPREME COURT,
11 2097, PAGE 2110, AND THAT'S 2000.

12 THE CASES HAVE RECOGNIZED THE JUDGMENT, AS A
13 MATTER OF LAW, IS A HEAVY BURDEN. TAKE A LOOK AT THE PINEDA
14 VERSUS UNITED PARCEL SERVICES CASE, 360 FED. 3RD, 483, AND THEY
15 ALSO USE LANGUAGE SUCH AS IF REASONABLE PERSONS COULD DIFFER ON
16 INTERPRETATION, AND THE MOTION SHOULD BE DENIED. JMOL IS GOING
17 TO BE GRANTED WHEN THE FACTS AND INFERENCES POINT SO STRONGLY
18 AND OVERWHELMINGLY IN FAVOR OF ONE PARTY IF THE COURT BELIEVES
19 REASONABLE MEN COULD NOT ARRIVE AT A CONTRARY VERDICT. WE SEE
20 THAT IN WALLACE VERSUS METHODIST HOSPITAL SYSTEM, 271 FED. 3RD,
21 212 AT PAGE 219, FIFTH CIRCUIT OF 2001.

22 AND THEN AGAIN LOOKING AT REEVES, THE SUPREME
23 COURT SAID THAT NORMALLY BE GRANTED ONLY WHEN THERE'S NO
24 LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO
25 FIND FOR THE PARTY ON AN ISSUE, ONE SET PARTY HAS BEEN FULLY

1 HEARD.

2 AND SO LOOKING AT CASES AND WHAT THE COURT HAS
3 TO DO IS, OF COURSE, SHOULD FIRST DRAW ALL REASONABLE
4 INFERENCES IN FAVOR OF THE NONMOVEMENT, ELLIS VERSUS WEESLER,
5 258 FED. 3RD, 326: GIVE CREDENCE TO EVIDENCE SUPPORTING
6 MOVEMENT THAT IS UNCONTRADICTED AND UNIMPEACHED. AND THAT'S
7 ELLIS VERSUS WEESLER, AND I'VE GOT TO SAY THAT THERE'S ALMOST
8 NO EVIDENCE IN THIS CASE IS UNCONTRADICTED OR UNIMPEACHED IN
9 ONE WAY OR ANOTHER. AND THEN TAKE INTO ACCOUNT MOVANT'S BURDEN
10 OF PROOF. THAT'S SET OUT IN THE HARSKO VERSUS KIRKEN CASE, 965
11 FED. SUPP, 580, PAGE 584. THAT'S OUT OF THE DISTRICT COURT OF
12 MARYLAND, PENNSYLVANIA, 1997. IT WAS A PATENT CASE. AND GIVEN
13 THE VARIOUS BURDENS OF PROOF IN A PATENT CASE, IT MAKES A LOT
14 OF SENSE.

15 SO AS TO JUDGEMENT AS A MATTER OF LAW
16 DR. TJADEN'S BURDEN OR DEFENDANT'S BURDEN WOULD HAVE BEEN ON
17 ANTICIPATION WAS STILL CLEAR AND CONVINCING EVIDENCE. AND
18 AGAIN, I'VE GOT TO SAY THAT WITH THE TESTIMONY PROVIDED BY
19 MR. EATON, IT CERTAINLY SEEMED THAT A CASE FOR ANTICIPATION
20 MIGHT HAVE BEEN MADE. BUT, ON THE OTHER HAND, I'VE GOT TO TAKE
21 INTO CONSIDERATION THAT I'VE READ THE GECSEI BOOK, HAD DONE A
22 LOT MORE STUDY THAN WAS ACTUALLY JUST PRESENTED AT TRIAL. AND
23 I'VE GOT TO LOOK WHEN I'M LOOKING AT THIS, WHAT WAS PRESENTED
24 TO THE JURY. AGAIN, TO THE JURY THERE WERE PARTS OF THAT BOOK
25 THAT WERE NOT CHARTED OR MENTIONED BY DR. TJADEN IN HIS

1 TESTIMONY. HE CHOSE TO USE SUMMARIES FOR THE STEPS TO EACH
2 CLAIM RATHER THAN THE LANGUAGE OF THE CLAIM ITSELF. THAT WAS
3 CONFUSING, AND I MADE A NOTE THAT EVEN MR. TOUTON SEEMED TAKEN
4 A LITTLE ABACK WHEN THAT FIRST WENT UP ON THE BOARD. THE JURY
5 WAS INSTRUCTED THAT DIRECTV HAD TO PROVE BY CLEAR AND
6 CONVINCING EVIDENCE EACH AND EVERY STEP OF A CLAIM WAS PRESENT
7 IN THE GECSEI BOOK. HIS TESTIMONY USED SUMMARIES AND
8 CONCLUSION AND ANIMATION THAT WAS NOT IN THE BOOK. NOW BRIEF
9 USE IN ANIMATION CAN SOMETIMES EXPLAIN A DIAGRAM, BUT THOSE
10 ANIMATED JELLY BEANS, FOR EXAMPLE, IN FIGURE 10.5 COULD ALSO BE
11 SEEN AS JUST AN EXTRAPOLATION OR INTERPRETATION OF THE DIAGRAM
12 THAT WASN'T IN THE BOOK ITSELF, WASN'T REALLY TAKEN FROM THE
13 TEXT, AND IT MAY NOT HAVE BEEN CLEARLY AND CONVINCING -- OR IT
14 WASN'T CLEARLY AND CONVINCING ESTABLISHED, IF THAT'S THE
15 INTERPRETATION THAT ONE SKILLED IN THE ART PRIOR TO
16 NOVEMBER 1991 WOULD HAVE DRAWN. AND, OF COURSE, THE JURY IS
17 ENTITLED TO DISBELIEVE DR. TJADEN. THEY COULD DISCOUNT HIS
18 CREDIBILITY -- CREDIBILITY BASED ON ANY NUMBER OF FACTORS,
19 INCLUDING THE AMOUNT HE WAS PAID, THE AMOUNT OF TIME HE TOOK,
20 ANY NUMBER OF FACTORS WHICH THEY'RE INSTRUCTED THEY CAN
21 CONSIDER. AND THEY'RE ENTITLED TO CONSIDER THE ALTERNATE
22 EXPLANATIONS FOR THE DIAGRAMS AND THE ANIMATED DIAGRAM GIVEN BY
23 MR. EATON.

24 I'VE INDICATED MR. EATON'S TESTIMONY FROM THE
25 COURT'S POINT OF VIEW MAY NOT HAVE BEEN CLEAR AND CONVINCING,

1 BUT THAT WASN'T HIS BURDEN. IT'S WASN'T FINISAR'S BURDEN TO
2 PROVE BY CLEAR AND CONVINCING; IT WAS DEFENDANT'S BURDEN.
3 TECHNICALLY, DEFENDANT -- PLAINTIFF COULD BE SILENT ON THAT
4 ISSUE AND THE OTHER SIDE JUST MIGHT NOT MAKE THE BURDEN AND
5 COULD JUST TAKE HIM ON CROSS EXAMINATION. SO IN THE END
6 DEFENDANT -- DIRECTV HAD THE BURDEN OF PROOF BY CLEAR AND
7 CONVINCING EVIDENCE. THE JURY DIDN'T FIND THAT HE MADE IT --
8 THEY MET IT, AND THE COURT CAN'T POINT TO ANY EVIDENCE THAT WAS
9 CLEAR AND CONVINCING OR SO OVERWHELMING REASONABLE JURY SHOULD
10 HAVE FOUND OTHERWISE. MOTION FOR JUDGMENT AS A MATTER OF LAW
11 ON THAT ISSUE IS DENIED.

12 THEN WE GO ON TO THE LATCHES. NOW, HERE THE
13 JURY'S OPINION OR VERDICT IS ADVISORY. IT'S AN EQUITABLE
14 DEFENSE, AND THE COURT HAS TO LOOK AT THE PARTICULAR FACTS AND
15 CIRCUMSTANCES OF THIS CASE, WEIGH THE EQUITIES OF THE PARTIES.
16 THAT'S THE AC HACKERMAN COMPANY VERSUS KHCHAIDES CONSTRUCTION,
17 960 FED. REPORTER 2D. 1020, FED CIRCUIT 1992. AND HERE DIRECTV
18 WOULD HAVE HAD THE BURDEN TO PROVE TWO FACTORS: ON, DEFENDANT
19 DELAYED FILING SUIT FOR UNREASONABLE LENGTH OF TIME, THE TIME
20 PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF ITS CLAIM AGAINST THE
21 DEFENDANT, AND THE DELAY OPERATED A PREJUDICE OR INJURY TO
22 DEFENDANT. THAT'S AT PAGE 1032 OF THE HACKERMAN CASE.
23 MATERIAL PREJUDICE IS ESSENTIAL FOR A LATCHES DEFENSE, AND THEY
24 TALK ABOUT THAT IN THE HACKERMAN CASE AT PAGE 1033.
25 EVIDENTIARY PREJUDICE ARISES WHEN THE DELAY CAUSES DOCUMENTS TO

1 BE LOST, UNRELIABILITY OF MEMORY, DEATH OF WITNESSES, SO FORTH.
2 ECONOMIC PREJUDICE ARISES IF THE DEFENDANT WOULD HAVE LOST
3 MONETARY INVESTMENTS OR INCURRED DAMAGES WHICH COULD HAVE BEEN
4 PREVENTED BY AN EARLIER SUIT.

5 NOW, THERE WAS SOME EVIDENCE BY SAUSVILLE THAT
6 HE BROUGHT THE PATENT TO THE ATTENTION OF HUGHES IN 1997 AND
7 THEN SOME EVIDENCE BROUGHT OUT BY MR. SAVIKAS ON CROSS
8 EXAMINATION THAT HE KNEW OR SHOULD HAVE BEEN ABLE TO FIGURE OUT
9 THE DIRECTV SYSTEM INFRINGED. THAT WAS MAINLY BASED ON
10 SUPPOSEDLY HOW SMART HE WAS. BUT THE PROBLEM HERE FROM THE
11 JURY'S POINT OF VIEW AND THE COURT'S POINT OF VIEW IS
12 DIRECTV'S -- LIKE BOTH PARTIES DID AND COUNSEL ARE ENTITLED TO
13 DO, BUT I THINK YOU HAVE TO BE CAREFUL WHEN YOU'RE DOING THIS
14 TO A JURY BECAUSE THEN THEY HAVE CONFLICTING EVIDENCE ARGUING
15 BOTH SIDES OF THE ISSUE. FROM THE JURY'S POINT OF VIEW AND
16 FROM YOUR EVIDENCE ON BOTH SIDES AND IF THERE'S CONFLICTING
17 EVIDENCE, JMOL CAN'T BE GRANTED. WE HAD A PROFESSOR FROM MIT
18 EXPLAIN THAT DIRECTV'S METHOD WAS FAR DIFFERENT FROM THAT OF
19 THE PATENT. AND ON THE OTHER SIDE SHOW THAT SAUSVILLE, WHO A
20 SHORT TIME IN 1997 WAS EMPLOYED AS A SALESMAN FOR FINISAR,
21 SHOULD HAVE INSTANTLY KNOWN OF THE INFRINGEMENT. WHEN YOU'VE
22 GOT THAT KIND OF CONFLICT, THE COURT CAN'T FAULT THE JURY FOR
23 FAILING TO FIND LATCHES, AND AS A MATTER OF EQUITY THE COURT
24 DOESN'T FIND THE ARGUMENT VERY CONVINCING. DIRECTV ALSO ARGUED
25 THAT FINISAR COULD HAVE BROUGHT A SET TOP BOX, ANALYZED THE

1 SYSTEM TO DETERMINE INFRINGEMENTS, AND THAT RAISES THE QUESTION
2 IS: ARE PATENT HOLDER REQUIRED TO ASSUME THAT TECHNOLOGY
3 ASSOCIATED WITH THEIR FIELD IS INFRINGING, INVESTIGATE IT AND
4 TAKE ACTION? THE MERE USE OF SATELLITES AND TV DOESN'T MAKE IT
5 INFRINGING OR EVEN USE FOR PROGRAM DATA.

6 THE SIX-YEAR PRESUMPTION DOESN'T REALLY HELP
7 DIRECTV. JUST LIKE MOST PRESUMPTIONS, IT'S A BURSTING BUBBLE
8 PRESUMPTION. WE SEE THAT AT 960 FED. 2D. AT 1037 THERE IN THE
9 HACKERMAN CASE. WE HAVE SAUSVILLE, LEVINSON, AND RAWLS SAYING
10 THEY DIDN'T KNOW OF THE POSSIBLE INFRINGEMENT UNTIL THE TIME
11 WITHIN THE SIX YEARS BEFORE SUIT. YES, THERE WAS SOME CROSS
12 EXAMINATION OF THEM, BUT THERE'S NO REAL BASIS TO FIND THEY'RE
13 NOT CREDIBLE.

14 THE LETTER WAS SENT IN 2004 AND THEN SOME 400
15 DAYS LATER SUIT WAS FILED, SO AGAIN, LOOKING AT BURDENS OF
16 PROOF HERE, MAYBE FINISAR COULD HAVE KNOWN ABOUT THE
17 INFRINGEMENT; BUT IT'S JUST AS LIKELY THAT THEY DIDN'T AND
18 SHOULD NOT HAVE. SO THE COURT FINDS IT'S NOT BEEN SHOWN BY A
19 PREPONDERANCE OF THE EVIDENCE AND CERTAINLY NOT TO ANY HIGHER
20 STANDARD OF PROOF THAT FINISAR KNEW OF POTENTIAL INFRINGEMENT
21 BY DIRECTV PRIOR TO 2003 AND FINDS IT'S NOT BEEN SHOWN BY A
22 PREPONDERANCE OF THE EVIDENCE.

23 MORE IMPORTANTLY, IN THE ISSUE OF ECONOMIC
24 PREJUDICE, WHICH IS ANOTHER ISSUE, THERE'S NO REAL EVIDENCE OF
25 ECONOMIC PREJUDICE. THERE WAS TESTIMONY OF SUPPOSEDLY TWO

1 INEXPENSIVE ALTERNATIVES. SUPPOSEDLY THEY COST ABOUT \$800,000
2 TOTAL. IT COULD HAVE BEEN USED. BUT THERE WAS NO TESTIMONY
3 WHY THEY WEREN'T USED OR WHY THEY WOULD HAVE BEEN -- IT WOULD
4 BE MORE EXPENSIVE TO USE THEM NOW THAN IT WOULD HAVE BEEN BACK
5 THEN. THE COURT CAN IMAGINE THAT WAS TRUE, BUT I DIDN'T HEAR
6 ANY TESTIMONY ABOUT THAT FROM THE DEFENDANT. THE DEFENDANT'S
7 BEEN MAKING GOOD PROFITS. NOTHING INDICATES THEY CAN'T
8 CONTINUE MAKING GOOD PROFITS AND GOOD REVENUES, EVEN IF THERE
9 WAS A COMPULSORY LICENSE. AND SO NO REAL EXPLANATION ABOUT WHY
10 THERE HAVE BEEN ECONOMIC PREJUDICE IF THIS HAD BEEN BROUGHT UP
11 AT THE DAY THAT THE PATENT WAS ISSUED OR -- YEAH, THE DAY THE
12 PATENT ISSUED. AND THEN EVIDENTIARY PREJUDICE, YOU GET INTO
13 WHERE DOCUMENTS AND WITNESSES AND SO FORTH WHERE THERE WAS SOME
14 HINT BY MS. FERGUSON OF DOCUMENTS BEING HARD TO FIND AND SOME
15 COPIES OF DOCUMENTS BEING A LITTLE DIFFERENT, BUT SHE NEVER
16 TESTIFIED, FOR EXAMPLE, THAT THERE WAS A DOCUMENT DISPOSAL
17 PROGRAM IN PLACE OR BEEN A FIRE THAT DESTROYED A BUNCH OF
18 DOCUMENTS. YES, THERE'S BEEN SOME CHANGE OF CORPORATION, BUT
19 YOU'D EXPECT KEY DOCUMENTS WOULD BE KEPT. NO TESTIMONY ABOUT
20 KEY WITNESS BEING MISSING. WE HAD TESTIMONY FROM THE FIRST CEO
21 OR PRESIDENT, MR. HARTENSTEIN. WE HAD MS. FERGUSON, WHO WAS
22 THERE FROM THE BEGINNING, SHE SAID, IN HER JOB IN MARKETING.
23 AND THEN ROBERT ARCENEAU, I BELIEVE, WHO HAD TESTIFIED THAT HE
24 WAS THERE FROM AT LEAST 1992, AND HE WAS RESPONSIBLE FOR THIS
25 PROGRAMMING. AND I THINK THAT HE PUT HIMSELF THE ULTIMATE

1 AUTHORITY OR THE ABSOLUTE AUTHORITY ON THE SYSTEM. SO THERE'S
2 NO INDICATION THAT ANY DELAY, EVEN IF THERE HAD BEEN A LONG
3 DELAY, WOULD SOMEHOW PREJUDICE DIRECTV. SO THEN DIRECTV
4 DOESN'T MEET IT'S BURDEN ON THIS. AND THE JURY WASN'T
5 CONVINCED, AND MORE IMPORTANTLY, NEITHER IS THE COURT. SO, THE
6 MOTION FOR SUMMARY -- ANY MOTION FOR SUMMARY JUDGMENT AND THE
7 JUDGMENT AS A MATTER OF LAW ON LATCHES ARE DENIED.

8 NOW, WE THEN GET INTO THE INDUCED INFRINGEMENTS,
9 AND IN LIGHT OF THE FINDING OF DIRECT INFRINGEMENT BY THE JURY
10 MAY BE MOOT. THE BURDEN ON THIS ISSUE IS ON FINISAR BY A
11 PREPONDERANCE OF THE EVIDENCE. AND THERE WAS AMPLE EVIDENCE OF
12 JOINT INFRINGEMENT BY THE NAMED DEFENDANTS. BUT THE COURT
13 CONCLUDES INSUFFICIENT EVIDENCE AS TO ANYBODY OTHER THAN THE
14 NAMED DEFENDANTS BEING INVOLVED IN ANY TYPE OF INFRINGEMENT.
15 SO THE COURT CONCLUDES THERE IS NO LEGALLY SUFFICIENT BASIS FOR
16 A JURY TO FIND INDUCED INFRINGEMENT AS WHO WAS INDUCED OTHER
17 THAN THE NAMED DEFENDANTS ALREADY. SO THE DEFENDANT'S MOTION
18 FOR JMOL ON INDUCED INFRINGEMENT IS GRANTED. AGAIN, THE COURT
19 RECOGNIZES THIS MAY BE MOOT. AND SIMILARLY, AS TO THE
20 CONTRIBUTORY INFRINGEMENT, FINISAR HAS THE BURDEN BY A
21 PREPONDERANCE OF THE EVIDENCE. AMPLE EVIDENCE OF JOINT
22 INFRINGEMENT OF THE NAMED DEFENDANTS. INSUFFICIENT EVIDENCE AS
23 TO ANYBODY OTHER THAN THE NAMED DEFENDANTS BEING INVOLVED. NO
24 REAL EVIDENCE OF A SALE OF AN ITEM OR METHOD THE ALLOWED
25 SOMEONE ELSE TO INFRINGE. AND SO, AGAIN, THE COURT CONCLUDES

1 THERE IS LEGAL INSUFFICIENT -- THERE IS NO LEGALLY SUFFICIENT
2 THAT A JURY FIND CONTRIBUTORY INFRINGEMENT. DEFENSE MOTION FOR
3 JMOL ON CONTRIBUTORY INFRINGEMENT IS GRANTED.

4 NOW, WILLFUL INFRINGEMENT, DEFENDANT HAS A JMOL
5 ON THAT. HERE, THE BURDEN IS ON THE DEFENDANT TO PROVE BY
6 CLEAR AND CONVINCING EVIDENCE. AND THE COURT HAS TO BE MINDFUL
7 OF VARYING DEGREES OF WILLFULNESS RANGING FROM WHAT YOU MIGHT
8 TALK ABOUT AS A NEGLIGENT DISREGARD OF PATENT HOLDER'S RIGHTS
9 CHOOSING NOT TO INVESTIGATE TOO CLOSELY OR QUICKLY TO A
10 DELIBERATE VIOLATION OF THOSE RIGHTS, DELIBERATELY COPYING,
11 STEALING EMPLOYEES, STEALING DOCUMENTS. AND IT'S TAKEN FROM
12 THE VIRGINIA PANEL CORPORATION VERSUS MACK PANEL COMPANY, 133
13 FED. 3RD. 860, FIFTH CIRCUIT, 1997. IT'S SPECIFICALLY AT PAGE
14 867 AND ALSO AT NOTE 4 ON PAGE 867.

15 NOW, THE FACTORS THAT THE COURT SHOULD LOOK AT
16 TO SEE IF THERE WAS LEGALLY INSUFFICIENT EVIDENCE AS SET OUT
17 BASICALLY IN THE JURY INSTRUCTIONS IS WAS THE INFRINGER -- AND
18 THIS IS ON WILLFUL -- DID THE INFRINGER DELIBERATELY COPY THE
19 IDEAS OF ANOTHER, DID THEY DELIBERATELY COPY THE IDEAS OF
20 ANOTHER? NO EVIDENCE OF THAT. IF THERE HAD BEEN, IT WOULD
21 INDICATE A MORE SEVERE FORM OF INFRINGEMENT INVOLVING KNOWING
22 VIOLATION AT THE VERY START. THIS FACTOR IS IN DIRECTV'S
23 FAVOR. WHETHER THE INFRINGER ONLY KNEW THE OTHER -- THE
24 OTHER'S PATENT PROTECTION INVESTIGATED THE SCOPE OF THE PATENT
25 AND FORMED A GOOD FAITH BELIEF THAT IT WAS INVALID OR NOT

1 INFRINGED. THERE WAS SOME EVIDENCE ON THIS, BUT CLEARLY THE
2 LETTER WAS SENT IN 2004. MR. CROOK SEEMED WELL QUALIFIED IN
3 THE FIELD OF PATENT LAW, NEVER EXPLAINED HOW HE HIMSELF OR HIS
4 DIRECT STAFF DETERMINED THE INFRINGEMENT. THERE'S AN
5 INDICATION HE THOUGHT THERE WAS NO INFRINGEMENT, BUT CLEARLY
6 THERE'S NO EVIDENCE ABOUT WHY HE MIGHT HAVE THOUGHT IT WAS
7 INVALID OR INDEFINITE. IT SEEMED LIKE HE WOULD HAVE BEEN WELL
8 QUALIFIED, BUT AS SET OUT IN EARLY HEARINGS AND EARLIER
9 RULINGS, DIRECTV CHOSE NOT TO LIST HIM AS AN EXPERT, CHOSE NOT
10 TO PROVIDE ANY OPINIONS HE MIGHT HAVE AS A WILLFULNESS OPINION.
11 AND THERE MAY HAVE BEEN GOOD TACTICAL REASONS TO DO THIS, SUCH
12 AS NOT WANTING TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE; BUT
13 THAT'S DEFENDANT'S CHOICE. WHEN YOU MAKE TACTICAL CHOICES IN A
14 CASE LIKE THIS, AND YOU WANT TO PROTECT SOME THINGS, YOU LOSE
15 THE OPPORTUNITY TO USE THAT. NOW, HE DID TESTIFY ABOUT
16 CONTACTING OUTSIDE COUNSEL. THAT PROCESS WASN'T PARTICULARLY
17 QUICK. THERE WAS SOME EXPLANATION. TAKE OVER DIRECTV, SHAKE
18 UP AT THE LAW FIRM, BUT THAT'S NOT ENOUGH TO OVERTURN THE
19 JURY'S VERDICT ON WILLFULNESS. AND THERE IS EVIDENTLY THERE
20 WAS NEVER ANY REAL INVESTIGATION OR OPINION ON VALIDITY. THE
21 OUTSIDE FIRM DIDN'T LOOK AT THAT, AND THAT WAS REALLY -- WHEN
22 THE COURT HAS BEEN CALLING THIS CASE CLOSE, THAT'S WHAT WAS
23 CLOSE. YOU READ THAT OPINION, I'M SORRY, READ THAT PATENT AND
24 YOU RIGHT AWAY -- I MEAN, I THINK ANYBODY LOOKS AT THAT AND
25 SAYS THAT SEEMS TO HAVE SOMETHING TO DO WITH SATELLITE TV OR

1 CABLE TV OR THAT KIND OF THING. AND ON THE OTHER HAND, YOU
2 THINK THIS HAS BEEN GOING ON FOR YEARS BEFORE 1995. SURELY
3 THERE'S SOMETHING, I MEAN, ODD ABOUT THIS. BUT THAT'S WHAT I
4 MEAN BY CLOSE, WHEN YOU TAKE A FIRST LOOK AT IT AND YOU LISTEN
5 TO THE ANTICIPATION OF EVIDENCE AND ALL, IT'S CLOSE, BUT
6 INFRINGEMENT WASN'T, WHEN YOU GET INTO WILLFULNESS, I HEARD
7 VIRTUALLY NO TESTIMONY AT ALL ON THE PART OF DIRECTV THAT THEY
8 REALLY INVESTIGATED WHAT WOULD LOGICALLY SEEM TO HAVE BEEN
9 THEIR GOOD DEFENSES, INVALIDITY, INDEFINITENESS. SO THIS
10 FACTOR HAS TO BE IN FINISAR'S FAVOR IN DECIDING WILLFULNESS.

11 WHETHER DIRECTV HAD A SUBSTANTIAL DEFENSE ON
12 INFRINGEMENT, I REASONABLY BELIEVE THE DEFENSE WOULD BE
13 SUCCESSFUL IF LITIGATED, AND THERE WERE DEFENSES TO THE CLAIMS.
14 DEFINITENESS ON MANY CLAIMS IS GRANTED. INFRINGEMENT ISSUE IS
15 VERY HARD TO DEFEND. ANTICIPATION, OBVIOUS DEFENSES MIGHT --
16 WITH A DIFFERENT PRESENTATION OR DIFFERENT CROSS EXAMINATION
17 MIGHT HAVE CONVINCED SOME JURIES. BUT, THE PREMISE IS
18 CONSIDERING THE PREVIOUS CONSIDERATION, THERE WASN'T EVIDENCE
19 THAT THIS WAS ACTUALLY CONSIDERED OR DECIDED BY DIRECTV.
20 MR. CROOK MAY HAVE MADE THE DECISION. NO DISCUSSION THAT
21 MANAGEMENT LOOKED AT IT, EVALUATED IT, WEIGHED COST BENEFIT OR
22 ANYTHING LIKE THAT. THIS ONE, THIS FACTOR TILTS TOWARD
23 FINISAR.

24 WHETHER DIRECTV MADE A GOOD FAITH EFFORT TO
25 AVOID INFRINGING A PATENT, FOR EXAMPLE, BY TAKING REMEDIAL